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Acting United States Trustee for Region 3¹

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION,

- and -

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

- ☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric Company
☒ Affects both Debtors

** All papers shall be filed in the lead case,
No. 19-30088 (DM)*

Bankruptcy Case
No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

Date: May 22, 2019
Time: 9:30 a.m.
Place: Hon. Dennis Montali
450 Golden Gate Avenue
16th Floor, Courtroom 17
San Francisco, CA 94102

**MOTION OF THE UNITED STATES TRUSTEE FOR ORDER APPOINTING FEE
EXAMINER AND ESTABLISHING PROCEDURES FOR CONSIDERATION OF
REQUESTED COMPENSATION AND REIMBURSEMENT OF EXPENSES**

Pursuant to 28 U.S.C. § 586 and 11 U.S.C. §§ 105(a) and 330, Andrew R. Vara, Acting
United States Trustee for Region 3 (the “United States Trustee”), by and through his undersigned
counsel, hereby moves (the “Motion”) for an Order appointing a fee examiner (the “Fee
Examiner”) and for related modifications to the Court’s *Order Authorizing the Debtors to
Establish Procedures for Interim Compensation and Reimbursement of Expenses of Professionals*,

¹Andrew R. Vara, Acting United States Trustee for Region 3, is acting in this appointment for Tracy Hope Davis,
United States Trustee for Region 17, who has recused herself.

1 ECF No. 701 (the “Interim Compensation Order”). The United States Trustee recommends that
2 Professor Bruce A. Markell be appointed as the Fee Examiner based on his experience, character,
3 and judgment. This recommendation is supported by Professor Markell’s declaration and
4 curriculum vitae, each of which are attached as **Exhibit A**. The proposed form of order for
5 Professor Markell’s appointment is attached as **Exhibit B**.

6 **INTRODUCTION**

7 The United States Trustee respectfully requests that the Court appoint a fee examiner to
8 provide substantive analysis of the fee requests to be filed by the numerous estate professionals
9 whose retentions have been authorized by the Court or are the subject of pending or forthcoming
10 retention applications. Given the magnitude of these Chapter 11 cases and the number of retained
11 professionals who will apply to this Court for compensation, scrutiny of professional fees will
12 prove especially challenging. To meet these challenges and to ensure that all professional fee
13 requests meet applicable Bankruptcy Code requirements, the Court should appoint a fee examiner.
14 Because the Debtors’ business affects a large segment of the general consumer public, such an
15 appointment will also help ensure public confidence in the Bankruptcy System.²

16 **BACKGROUND**

17 1. On January 29, 2019, the Debtors commenced the above-captioned cases by filing
18 voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. *See* ECF No. 1. No
19 trustee has been appointed in the Debtors’ cases. *See generally* Case Dockets.

20 2. The Debtors’ Chapter 11 cases are being jointly administered for procedural
21 purposes only pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure. ECF No.
22 207.

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27 ²The United States Trustee has engaged in discussions with counsel to the Debtors, the Official Committee of
28 Unsecured Creditors, and the Official Committee of Tort Claimants regarding the relief sought in the Motion, the
proposed order on the Motion, and the selection of a Fee Examiner. The United States Trustee is informed that the
Debtors and the Committees do not presently oppose the appointment of a Fee Examiner.

1 3. On February 12, 2019, the United States Trustee appointed an Official Committee
2 of Unsecured Creditors (“OCC”). *See* ECF No. 409. On February 15, 2019, the United States
3 Trustee appointed an Official Committee of Tort Claimants (“TCC”). *See* ECF No. 453.

4 4. The section 341(a) meeting of creditors in these cases was called on March 4, 2019
5 and continued to April 29, 2019. *See* ECF Nos. 396, 736.

6 5. On February 27, 2019, the Court entered an Order Authorizing the Debtors to
7 Establish Procedures for Interim Compensation and Reimbursement of Expenses of Professionals
8 (“Interim Compensation Order”). ECF No. 701.

9 6. Following the filing, the Debtors have employed with Court approval (or
10 applications are pending for) the following professionals:

- 11 a. Weil, Gotshal & Manges, counsel for the Debtors;
- 12 b. Keller & Benvenuti LLP, co-counsel for the Debtors;
- 13 c. AP Services, LLC (Chief Restructuring Officer, Deputy Chief Restructuring
14 Officer, and Additional Personnel);
- 15 d. Lazard Frères & Co. LLC, Investment Banker for the Debtors;
- 16 e. Jenner & Block LLP, special corporate defense counsel for the Debtors; and
- 17 f. Cravath, Swaine & Moore LLP, corporate and litigation counsel for the
18 Debtors.
- 19 g. Munger, Tolles & Olson LLP as special counsel.

20 7. The TCC has filed applications to employ (i) Baker & Hostetler, LLP as its counsel,
21 and (ii) Lincoln Partners Advisors LLC as its financial adviser.

22 8. The OCC has filed applications to employ (i) Milbank LLP as its counsel, (ii) FTI
23 Consulting, Inc. as its financial advisors, and (iii) Centerview Partners LLC as its investment
24 bankers.

25 **AUTHORITY FOR THE APPOINTMENT OF A FEE EXAMINER**

26 Section 330(a)(3) of Title 11 sets forth the standards for authorizing compensation to
27 professionals retained in bankruptcy cases:

1 In determining the amount of reasonable compensation to be awarded ... the court
2 shall consider the nature, the extent, and the value of such services, taking into
account all factors, including—

- 3 (A) the time spent on such services;
- 4 (B) the rates charged for such services;
- 5 (C) whether the services were necessary to the administration of, or
beneficial at the time at which the service was rendered toward the
completion of, a case under this title;
- 6 (D) whether the services were performed within a reasonable amount of
time commensurate with the complexity, importance, and nature of the
problem, issue, or task addressed;
- 7 (E) with respect to a professional person, whether the person ... has
demonstrated skill and experience in the bankruptcy field; and
- 8 (F) whether the compensation is reasonable based on the customary
compensation charged by comparably skilled practitioners in cases other
than cases under this title.

11 11 U.S.C. § 330(a)(3). It is the Court's responsibility to review applications for compensation and
12 reimbursement of expenses and to enter appropriate Orders on them. The United States Trustee is
13 also charged with reviewing fee applications and commenting when appropriate. 28 U.S.C. §
14 586(a)(3)(A).

15 In complex cases, a number of bankruptcy courts have appointed fee examiners pursuant to
16 Section 105 of the Bankruptcy Code. The role of a fee examiner is different from that of an
17 examiner appointed under 11 U.S.C. § 1104(c) who is charged with conducting “an investigation
18 of the debtor as is appropriate.” 11 U.S.C. § 1104; *see also In re Collins & Aikman Corp.*, 368
19 B.R. 623, 625-627 (Bankr. E.D. Mich. 2007).

20 Fee examiners or fee review committees have been appointed in many significant and
21 complex bankruptcy cases, including but not limited to *Energy Future Holdings Corp.*, ECF No.
22 1896, Case No. 14-10979-CSS (Bankr. D. Del.), *The Budd Company, Inc.*, ECF No. 346, Case No.
23 14-11873-JBS (Bankr. N.D. Ill.), *Lehman Brothers Holdings, Inc.*, ECF No. 3651, Case No. 08-
24 13555-scc (Bankr. S.D.N.Y.), *Motors Liquidation Company (f/k/a General Motors)*, ECF No.
25 4708, Case No. 09-50026-reg (Bankr. S.D.N.Y.), *AMR Corp.*, ECF No. 2897, Case No. 11-15463-
26 shl (Bankr. S.D.N.Y.), *Exide Technologies*, ECF No. 1283, Case No. 13-11482-KJC (Bankr. D.
27 Del.), and *Mineral Park, Inc.*, ECF No. 274, Case No. 14-11996-KJC (Bankr. D. Del.).
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1 The Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and guidelines issued
2 by the bankruptcy courts and the Executive Office for U.S. Trustees impose fairly rigorous and
3 detailed timekeeping and reporting standards on professionals.

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5 Even with electronic data and filing now widely in use, those
6 detailed reporting requirements impose a significant burden on the
7 courts: daily narrative time records for hundreds and, in some
8 proceedings, thousands of timekeepers fill thousands of pages and
9 hundreds of thousands of lines. On occasion, usually by stipulation,
the bankruptcy courts have utilized fee auditors, fee examiners, and
fee committees to provide quantitative and qualitative analysis and
recommendations.

10 *Baker Botts L.L.P. v. Asarco, LLC*, 2014 WL 6984132 (Supreme Court December 10, 2014)
11 (*Amicus Brief of Neutral Fee Examiners Supporting Neither Party*).

12 **ARGUMENT**

13 **A. The Court Should Appoint a Fee Examiner**

14 Given the size and complexity of these Chapter 11 cases, the United States Trustee requests
15 that the Court appoint a fee examiner to review and report on as appropriate the monthly invoices
16 submitted in accordance with the Interim Compensation Order and all interim and final
17 applications for allowance of compensation and reimbursement of expenses filed by professionals
18 retained under sections 327, or 1103 of the Bankruptcy Code or similar authority (the “Retained
19 Professionals”), in accordance with sections 328, 330, and 331 of the Bankruptcy Code and the
20 Interim Compensation Order (collectively, the “Applications”).

21 The appointment of a fee examiner will promote consistency, predictability, and
22 transparency when the Retained Professionals file their Applications. In addition, all parties will
23 maintain their rights to review and contest any of the Applications.

24 Because the Debtors’ business affects a large segment of the general consumer public, the
25 appointment of a fee examiner will help ensure public confidence in the Bankruptcy system. *Cf.*,
26 *In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 168 (Bankr. S.D.N.Y. 1990)(where debtor’s business
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1 effects large segment of general public, consideration of public interest becomes a factor in
2 deciding to appoint trustee).

3 **B. Duties of Fee Examiner**

4 The United States Trustee requests that any order appointing a fee examiner impose certain
5 duties on the fee examiner (described below). Specifically, the Fee Examiner shall:
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- 7 a. establish, subject to court review and approval, a Protocol for examining fees
8 (“Protocol”), which shall contain procedures for the submission and
9 consideration of monthly invoices, Interim Fee Applications, and Final Fee
10 Applications filed by each Applicant in these Chapter 11 Cases;³
- 11 b. review Monthly Invoices, Interim Fee Applications and Final Fee Applications
12 filed by each Applicant in these Chapter 11 Cases (along with the fee detail
13 related thereto), and to the extent possible, the Fee Examiner shall avoid
14 duplicative review;
- 15 c. during the course of his review of an Application, consult, as he deems
16 appropriate, with each Applicant concerning such Application;
- 17 d. during the course of his review of an Application, review, to the extent
18 appropriate, any relevant documents filed in these Chapter 11 Cases to be
19 generally familiar with these Chapter 11 Cases and the dockets;⁴
- 20 e. within twenty-one (21) days after an Applicant files an Interim Fee Application
21 or Final Fee Application, serve an initial report (the “Initial Report”) on the
22 Applicant designed to quantify and present factual data relevant to whether the
23 requested fees, disbursements, and expenses are in compliance with the
24 applicable standards of sections 328, 329, 330, and 331 of the Bankruptcy Code,
25 Rule 2016 of the Bankruptcy Rules, and whether the Applicant (if required) has
26 made a reasonable effort to comply with the United States Trustee's requests for
27 information and additional disclosures as set forth in the Guidelines for
28 Reviewing Applications for Compensation and Reimbursement of Expenses
Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases Effective
as of November 1, 2013 (the “U.S. Trustee Guidelines”);

³ Capitalized terms in this paragraph shall take the meaning given them in the Interim Fee Order, entered February 28, 2019, as Docket Number 701.

⁴The Fee Examiner shall be deemed to have filed a request for notice of papers filed in these cases pursuant to Bankruptcy Rule 2002, and the Fee Examiner shall be served with all such papers.

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- 2 f. during the period between service of the Initial Report and filing of the Final
- 3 Report (as defined below), engage in written communication with each
- 4 Applicant, the objective of which is to resolve matters raised in the Initial Report
- 5 and to endeavor to reach consensual resolution with each Applicant with respect
- 6 to that Applicant's requested fees and expenses. The Fee Examiner may also use
- 7 the resolution process to revise findings contained in the Initial Report. Each
- 8 Applicant may provide the Fee Examiner with written supplemental information
- 9 that the Applicant believes is relevant to the Initial Report;
- 10 g. following communications between the Fee Examiner and the Applicant and the
- 11 Fee Examiner's review of any supplemental information provided by such
- 12 Applicant in response to the Initial Report, conclude the informal resolution
- 13 period by filing with this Court a report with respect to each Application (the
- 14 "Final Report") within fourteen (14) days after the service of the Initial Report.
- 15 The Final Report shall be in a format designed to quantify and present factual
- 16 data relevant to whether the requested fees and expenses of each Applicant are in
- 17 compliance with the applicable standards of section 330 of the Bankruptcy Code
- 18 and Rule 2016 of the Bankruptcy Rules, and whether the Applicant has made a
- 19 good faith reasonable effort to comply with the U.S. Trustee Guidelines; and
- 20 h. serve each Final Report on counsel for the Debtors, counsel for the Committees,
- 21 the United States Trustee, and each Applicant whose fees and expenses are
- 22 addressed in the Final Report.

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C. Authority of Fee Examiner

The United States Trustee also requests that any Court Order appointing a Fee Examiner also authorize the Fee Examiner to:

- a. notice, defend, or appear in any appeal regarding an Application;
- b. conduct and respond to discovery in connection with any Application, including making himself available for deposition and cross-examination by the Debtors, the OCC, the TCC, the United States Trustee, and other interested parties consistent with Rule 706 of the Federal Rules of Evidence; and
- c. retain, subject to Court approval, professionals (including attorneys and auditors) to represent or assist the Fee Examiner in connection with any of the foregoing.

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2 **D. Compensation of Fee Examiner**

3 The fees and expenses of the Fee Examiner shall be subject to application and review
4 pursuant to section 330 of the Bankruptcy Code, Bankruptcy Rule 2016, *the United States*
5 *Bankruptcy Court Northern District of California Guidelines for Compensation and Expense*
6 *Reimbursement of Professionals and Trustees*, the U.S. Trustee Guidelines, and the Interim
7 Compensation Order, and shall be paid from the Debtors' estates as an administrative expense under
8 section 503(b)(2) of the Bankruptcy Code. The fees paid to the Fee Examiner for his services shall
9 be determined and charged in accordance with sections 327-331 of the Bankruptcy Code and shall
10 not include any success fees. Further, the Fee Examiner's expenses shall be subject to the
11 information detail requirements set forth in Bankruptcy Rule 2016.

12 Should the Court decide to order the appointment of Professor Markell as the Fee Examiner,
13 his Declaration discloses that he bills at an hourly rate of \$900 per hour, subject to periodic revision
14 that will be noticed in advance. Further, as set forth in his declaration, Professor Markell proposes
15 the following fee structure for this appointment.

- 16 1. an initial, one-time, setup fee of \$25,000; and thereafter,
17 2. a flat fee of \$75,000 per month for the duration of this engagement.

18 The initial setup fee will cover the cost of preparing and obtaining approval of a fee protocol,
19 the cost of obtaining and training staff, and will allow the development of data analytics and analysis
20 that are based upon practice in the case thus far. Approximately \$15,000 of the setup fee will be
21 allocated to the fees and expenses of Joseph Tiano and his firm Legal Decoder, Inc. ("Legal
22 Decoder"), whose data analytics software Professor Markell plans to use to perform my analyses in
23 this case

24 From Professor Markell's monthly flat fee, he will pay all expenses of the engagement,
25 including:

- 26 1. The subscription and licensing fees of Legal Decoder, whose data analytics
27 software Professor Markell plans to use as the basis of his examinations for the
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1 duration of his appointment. Legal Decoder will charge Professor Markell a flat
2 monthly licensing fee of \$40,000 for its license and related services;

- 3 2. The hourly fees to be charged by those Professor Markell employs as fee
4 reviewers (at an estimated \$50 to \$100 per hour based on experience);
- 5 3. The costs and expenses related to any of Professor Markell's court appearances,
6 together with all travel expenses related to any such court appearances. Professor
7 Markell will not charge any time present in court or related to travel, nor will
8 Professor Markell charge for meals incurred during his travels. Time and
9 expenses for any other person that Professor Markell has employed, however,
10 will be outside the flat fee, and subject to the next paragraph; and
- 11 4. All other costs and expenses incurred that, in the exercise of Professor Markell's
12 judgment, are necessary or appropriate to fulfill his obligations as fee examiner
13 after the initial setup phase. These include any expenses for (i) an office or for
14 any services normally associated with an office (such as telephone, staff
15 assistance or other items of overhead), and (ii) any reimbursements requested by
16 Professor Markell's current employer, Northwestern University.
- 17 5. The flat fee compensation does **not** include:
- 18 a. Travel and related expenses for anyone other than Professor Markell
19 necessary for any court appearance requested by any party other than
20 myself;
- 21 b. Time spent by Professor Markell or anyone employed by Professor
22 Markell which relates to responding to discovery requests of any type, or
23 for any testimony, or for the preparation or of either. If such activities
24 arise in the course of the fee examiner's appointment, they will be charged
25 at the affected individual's then-currently hourly rate;
- 26 c. Time spent by Legal Decoder's personnel for:
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- 1 i. preparation, normalization, reviewing, or manipulation of data or
2 other information (both invoice data and professional biographical
3 data) provided by professionals in non-LEDES format or not in
4 compliance with data format and transfer requirements in the Fee
5 Examiner protocol;
6 ii. attending (in person or telephonically) any conference, deposition,
7 hearing or other meeting; or
8 iii. preparing any non-standard or customized report.
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10 d. If any of the activities covered by the preceding sub-paragraph are
11 undertaken by Legal Decoder personnel in the course of the fee
12 examiner's appointment, Legal Decoder will bill their time monthly at an
13 hourly rate ranging from \$75 to \$325 per hour (based on such individual's
14 expertise), and the aggregate total added to Professor Markell's monthly
15 flat fee. He will then pay the amount directly to Legal Decoder; or
16 e. time and expenses of any local counsel or other professional Professor
17 Markell may hire to represent him in this matter.

18 **E. Immunity of Fee Examiner**

19 The Fee Examiner, as an officer of the court, and those employed or paid by him with
20 respect to this appointment shall be given the maximum immunity permitted by law from civil
21 actions for all acts taken or omitted in the performance of his duties.

22 **F. Appointment of Chapter 11 Trustee**

23 In the event a chapter 11 trustee is appointed in these cases, such appointment will not
24 terminate or otherwise modify the duties and responsibilities of the Fee Examiner. The Fee
25 Examiner's appointment shall only be terminated or otherwise modified by entry of an Order of the
26 Court.

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1 **PROPOSED MODIFICATION TO THE INTERIM COMPENSATION ORDER**

2 Should the Court find that the appointment of a Fee Examiner is warranted under the
3 circumstances, the United States Trustee requests entry of an Order submitted herewith that will
4 supplement any interim compensation order previously entered in this case.
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CONCLUSION

The United States Trustee requests that the Court consider the foregoing, and appoint a Fee Examiner in these Chapter 11 cases subject to the terms herein, and grant such further relief as may be just. The United States Trustee recommends that the Court appoint Bruce A. Markell as the Fee Examiner according to the fee structure proposed in this motion and accompanying Declaration.

Dated: April 12, 2019

Andrew R. Vara
Acting United States Trustee, Region 3

By: /s/ Timothy S. Laffredi
Marta E. Villacorta
Timothy S. Laffredi
Attorney for United States Trustee